IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

LAND REFERENCE NO.01 OF 2023

ABEED MINAZALI MANJI (*Administrator of the estate of the late* **NADIR MINAZALI MANJI) ..... APPLICANT**

VERSUS

THE REGISTERED TRUSTEE OF DAUGTERS OF MARIA KIPALAPALA ..... RESPONDENT

RULING

May 17th & June 2nd, 2023

Morris, J

An application for reference under order 7 (1) of ***the Advocates Remuneration Order***, GN. No. 264 of 2015 is now before this court. The applicant, the losing party at the District Land and Housing Tribunal for Mwanza, (hereinafter, DLHT); was condemned to pay costs to the respondent. DLHT subsequently taxed the bill of costs at the Tshs. 7,872,000.

Before DLHT, the applicant had sued the respondent over ownership of Plot No. 1475 Block 'M' Kiseke. It was alleged that the suit land was previously owned by Nadir M. Manji who bought the same form Dr. Michael Mtebe. Both are now deceased. The former started processing

transfer of title into his name but death caught up with him before accomplishing the exercise. Consequently, the applicant was appointed to administer his estate. However, the respondent allegedly bought the suit land from undisclosed person and stated fencing it. That is how the dispute between parties herein sprout.

The suit met the respondent's preliminary objection (PO). It was challenged for being incompetent on basis of non-joinder of parties. The PO was sustained. The respondent earned costs too. Through DLHT taxation No. 296/2022, he garnered Tshs. 7,872,000. The applicant became aggrieved. Hence, this reference.

At this court, the applicant's sail was not without legal turbulence either. Another PO awaited him. The respondent raised it an objection that the present application was filed out of time. I ordered both PO and application to be argued simultaneously for the court to determine the objection first before embarking on the latter, where necessary. Ms. Judith Nyaki and Dr. George Mwaisondola, both learned counsel, represented the applicant and respondent respectively.

In favor of the preliminary objection, it was argued that the application was time-barred. That is, it was lodged beyond 21 days against

to rule 7 (2) of ***GN No. 264*** (*supra*). According to Dr. Mwaisondola, the impugned taxation was decided on 17/3/2023; this application filed on 5/4/2023; and payment made on 12/4/2023. He argued that the date of payment of fee constitutes the date of filing. Therefore, the application was filed 4 days beyond time. Reference was made to ***Maliselino B. Mbipi v Ostina Maritime Hyera***, Misc. Civil Application No. 08 of 2022 (unreported) which interpreted rule 21 of ***the Judicature and Application of Laws*** (***Electronic Filing***) ***Rules***, 2018 [(Electronic Filing Rules); GN. No. 148/2018] and rules 3 and 5 (1) of ***the Court Fee Rules***, 2018 (GN. No. 247/2018). He consequently prayed for the application to be dismissed with costs.

In reply, Ms. Nyaki submitted that, under rule 21(1) of ***GN No. 148/2018*** (*supra*); the filling date is determined by submission of the matter online. She referred to the case of ***Cata Mining Ltd v Obetho Joseph Werema***, HC Land Appeal No. 124 of 2021 (unreported).

It was submitted, in rejoinder that, since the applicant admitted to had paid fee on the 25th day, this application is time barred. Insistence was that payment date is a date of filing in terms of ***GNs Nos. 148*** and ***247*** both of 2018 (*supra*) read in conjunction. Also, the respondent's

counsel contended that ***Cata Mining's case*** (*supra*) is distinguishable for it considered matters not squarely similar to the current disputed issue; especially the purview of ***GNs Nos. 148*** and ***247*** (*supra*).

I have impassively considered rival submissions of both parties. Not in dispute is the fact that there exist two schools of thought regarding the date of filling documents after promulgation of online filling system. This court is equally divided. One school of thought is of the view that, under section 21 (1) of ***the Electronic Filing Rules***, electronically filed documents are considered to have been filed in court on the date the same are so submitted. Along such inclination are examples of ***Cata Mining Ltd v Obetho Joseph Werema*** (*supra*); ***Rose Ongara and 2 others v National Health Insurance Fund***, Labour Revision No. 313 of 2022; ***Mohamed Shashil vs. National Microfinance Bank Ltd***, Labour Revision No. 106 of 2020, (all unreported).

The second school of thought favors the date of payment of court fee (as proved by exchequer receipt) to be the date of filing. This school taps the wisdom from ***John Edward Chuwa v Antony Sizya*** [1992] TLR 233; ***Maliselino B. Mbipi v Ostina Maritime Hyera*** (*supra*), ***Emmanuel Bakundukize (Kendurumo) and 9 Others v Aloysius***

Benedictor Rutaihwa, Land Case No. 26 of 2020; and ***Bakema Said Rashid v Nashon William Bidyanguze and 2 Others***, Election Reference No. 1 of 2020 (all unreported).

Invited to join one of the two schools, I have to consider a number of factors before picking my preference. **One**, midst of these two schools of thought, is the doctrine of overriding objective reinforced by ***the Written Laws*** (***Miscellaneous Amendments***) (***No. 3***) ***Act***, 2018. The doctrine enjoins courts to deal with cases justly; paying regard to substantive justice; and observing the Constitutional spirit in this connection. **Two**, litigation is costly. Court fees are part of the package. Under ***GN 247/2018*** (*supra*), parties are generally obliged to pay court fees. Consequently, to validate compliance, courts should work on proceedings that are duly filed and fully paid for.

Three, new (***the Electronic Filing)*** Rules were enacted while the principle in ***John Edward Chuwa's case*** *(supra)* was in existence. Thus, it is not illogical to reason that if it was imperative to consider payment date to override the submission date, the Rules should have legislated as such. **Four**, ***the Electronic Filing Rules*** did not outlaw the orthodox physical filing of court documents. Hence, the subject Rules preserve the

laxity associated with physical filing. That is, e-filing and manual filing co-exist. So, the two schools should not conflict anyhow. Principles suitable for the manual filing system, including the date of payment being considered as the date of filing; can and should continue being applicable. However, such principles are not expected to, in my view, suppress the twin IT-filing system which, too, has its unique perfectly operating protocols.

Five, to undermine e-filing system by using rules suitable in the about-to-be-vacated filing system, is to downplay advantages of the digitalization of the world affairs, courts operations inclusive. Without overinsistence, the objectives of introducing e-filing are, *inter alia*, for the court system to keep pace with development of ICT; save time of the parties (expedition in litigation is the name of the game); lessen costs (for transport to and from the registry, administrative works, stationery and human resources); enhance productivity plus parties' peace of mind; and maintain an irreversible process in the interest of compliance, transparency and accountability.

All the foregoing usefulness combined, to a large extent, the current e-system works to the advantage of all stakeholders involved than

otherwise. Fenwick W.A. and Brownstone, R.D. in "***Electronic Filing: What Is It - What Are Its Implications***?", *Santa Clara High Technology Law Journal;* Vol. 19 pp. 181-227 (2002) underscore the fundamentals of e-filing in the below tonology;

> *"More courts are recognizing that they are 'service providers'…Courts and court staff are increasingly referring to parties and the public as being their 'customers' or 'clients.'…Most courts are trying, within severe resource constraints, to improve customer service. E-filing is believed to provide one of the greater opportunities to achieve such improvements."*

Six, e-filing technically involves digitized documents getting out of the party's mandate/control after submitting them on-line. Consequently, the Court's registry takes over. So, time taken before the court generates the requisite control number for the party to pay (where applicable), is determinable on case-to-case basis. It would turn to be unfair if such time is also deducted from the party. I observe that adequate flexibility is reflected in the phraseology of rule 21 (1) of ***GN No. 148/2018*** thus, "a document shall be considered to have been filed." That is, circumstances such as lateness to pay; repetitiveness in delay of payment by a party;

fluctuation of internet system; and expiry for control number, may be brought into the equation accordingly.

Seven and last, to strictly insist on the date of payment to be the only determinant factor, would be unrealistic a principle. I bring in my mind matters whose documents do not attract court fees. For instance, labour disputes; legal aid cases; proceedings for and against the Government; and fee-exemption under convention. That is, it will be imprecise for courts and parties to ascertain when exactly respective documents were filed.

In view of the elucidation above, I am favourably and strongly magnetized by the philosophy that the date of filing for electronically-filed documents should be the one on which such documents are submitted on-line; subject to, of course, observing that the party does not defeat the rationale of electronic filing system or abusing it. That is to say, in my considered view; if a party is claimed to have electronically filed the document out of time, the court should consider a couple of factors. Aspects hereof include, (1) the day(s) wasted from the day of generation of control number to the date of payment of fees; (2) availability or stability of internet connection in the locality, as far as IT experts may

certify; and (3) party's reluctance to comply with other-but-related court orders.

Back to the application at hand. It was filed on line 5/4/2023 and admitted on the same date. The control number was generated on 7/4/2023 (on Good Friday). However, payment of court fee was made on 12/4/2023. That is on the 25th day. In my view, and in line with the school of thought I associated myself above; the applicant filed this application online timely. I also take judicial notice, in line with section 59 (1) (g) of ***the Evidence Act***, Cap 6 R.E. 2022; the fact that the time-line herein was also intercepted by the Easter festivals which ended on 10/4/2023. Rule 21 (2) of ***GN No. 148/2018*** is, thus, considered. The PO is accordingly lacking merit. It is overruled.

I will now consider the application. In support of the application, the affidavit of Abeed Minazali Manji was filed. George Mwaisondola swore the counter affidavit in opposition. In favour of the application, it was submitted that, the taxed amount was excessively unjustifiable at Tshs. 7,872,000.

Out of the above sum, Tshs. 4,100,000 was for appearances at Tshs. 400,000/= each. This amount was contested by the applicant on the basis

that on such appearances, the case was not heard save for one day when ruling was delivered. The applicant also contested the instruction fee at Tshs. 3,950,000 for being disproportionate and having been based on estimated value of the suit property.

Further, Ms. Nyaki argued that, the matter was struck out preliminarily following a successful PO which was also argued by way of written submissions. She made reference to ***Tanzania Rent a Car Ltd v Peter Kimuhu***, Civil Reference No. 9 of 2020 to buttress her point. Her argument was that matters determined by preliminary objections; and that are not complex; assessment of fees thereof need to be done sparingly. Therefore, she prayed for instruction fee be reduced to Tshs. 1,000,000.

Also, the applicant's advocate contended that payment of Tshs. 100,000 allegedly paid on 20/12/2020 as consultation fee was wrongly inserted and allowed in the bill as the dispute had not arisen then. She further argued that, there is still a pending Civil Case No. 33/2022 before this court concerning the parties herein with other defendants. To her, the applicant still has a long way to go in pursuit of her rights. It was Ms.

Nyaki's further contention that costs should not be used to penalize parties.

In reply, it was submitted by the respondent's counsel that the amount was reasonable and justified. He argued that, the ***Advocates Remuneration Order***, GN. No. 264/2015 (elsewhere, the Order); allows courts' judicious discretion in taxation proceedings. Defending the instructions fee, the learned counsel stated that the same based on declaration of suit-property's value by the applicant as Tshs. 150,000,000. Therefore, according to the 9th schedule to the ***Order*** (*supra*), the applicable statutory scale yields Tshs. 3,500,000 which attracts VAT of Tshs. 630,000 hence, making a total of Tshs. 4,130,000. He argued further that, the charged Tshs. 3,950,000 was far below the minimum statutory rate.

To the defence counsel, the taxing master should not be faulted; after all, the matter before DLHT was complex. The complexity of the suit was, according to him, inferred from suing wrong parties; involvement of police investigation; and discovery of actual owner - all of which took almost one and a half years. He added that, the pending Land Case (No 33/2022) before this court, is irrelevant for it has no long way to be

concluded because it also faces preliminary objections. Regarding Tshs. 400,000 for attendance (per appearance), he argued that it was legal as per item 3 of the 8th schedule to the **Order**. He stated that parties for every appearance stayed at DLHT registry for an average of two hours each day. Therefore, the taxing master appreciated such fact in allowing the billed amount.

With regard to consultation fee of Tshs. 100,000 on 2/12/2020; it was argued that such discrepancy was a mere slip of pen. The correct date was 2/12/2021. Further, the counsel submitted that the taxing master did not allow item 22 of the bill. Reference was also made to the case of ***Mkombozi Commercial Bank PLC v Peacemaker Express Co. Ltd***, taxation No. 1 of 2022 (unreported) where the taxing master allowed Tshs. 300,000/= for attendance. He finalized by praying that, the application should be dismissed with costs for want of merit.

In rejoinder, the respective counsel reiterated contents of the submissions in chief. She further submitted that, appearance of advocate did not commerce upon filling of the suit but about 6 months later. She maintained that outcomes of the pending Land Case 33/2022 were

prematurely predicted by the respondent. She also disputed two hour-stay each day of appearance as claimed by the respondent.

The submissions from both sides are clear-cut. Whereas the applicant attacks the taxed figure, the responded finds no fault therefrom. I am, thus, invited to examine the proceedings, ruling and drawn order of the DLHT's taxing master for the purpose of scrutinizing its correctness, legality or appropriateness.

It is a cardinal principle of law that, discretionary powers of taxing master are only interfered under exceptional circumstances. See the case of ***Gautam Jayram Chavda v Covell Mathews Partnership***, Taxation Reference No. 21 of 2004 (unreported). Factors to be considered in rejecting or reducing the taxed amount, in accordance with, ***Southern Highland Earthworks Company Ltd v UAP Insurance Ltd***, Taxation Reference No. 01 of 2021 (unreported) include, suit amount; nature of the subject matter; its complexity; time taken for hearing and extent of research involved; parties' general behavior and facilitation of expeditious disposal of case; public policy of affordability in litigation; and maintenance of consistency in allowable quantum of costs.

It is also trite law that, a bill of costs only saves a purpose of compensating the decree holder for the actual sum incurred to prosecute or defend proceedings. Costs are not awarded to either punish the judgement debtor or to enrich the decree holder and/or the advocate. I cloth myself with the legal comfort from ***Doctore Malesa and 3 others vs. Mwanza City Council and Another***, reference No. 7 of 2021 (unreported); ***Premchand Rainchand Ltd and another v Quarry Services of East Africa Ltd and others*** [1972] 1 EA 162; and ***Tanzania Rent a Car Limited vs Peter Kimuhu*** (*supra*).

Starting with instruction fee, counsel for the applicant submitted that the same was excessive as the matter subject of taxation was not complex and it ended on preliminary stages. The opposite counsel refuted such contention. In the DLHT, instruction fee of Tshs. 3,950,000 was taxed in favour of the respondent. However, the tribunal did not indicate the specific provision of ***GN No. 264 /2015*** that was used to arrive at the final figure hereof. In his submissions, the respondent relied on the rate between 5% to 8% per 9th schedule to the ***Order***.

It has been held by this court manyfold, with which position I associate myself, that the scales which are set in the 9th schedule of the

Order cater for contentious proceedings regarding the liquidated sum. The liquidated sum must be agreed by parties in advance. In the case of ***Southern Highland Earthworks Company Ltd v UAP Insurance Ltd*** (*supra*) reference was made the Osborn's Concise Dictionary, Eight Edition which defines liquidated sum to mean "genuine covenanted pre-estimated of damages for an anticipated breach of contract, as contrasted with penalty." The court further referred to the definition by **Black's Law dictionary** which defined the liquidated sum as;

> *"An amount contractually stipulated as reasonable estimation of actual damage to be recovered by one party if the other party breaches, also if the parties to contract have agreed on liquidated damages, the sum fixed is the measure of damages for breach".*

In the matter at hand, there was no contractual relationship between the parties. Instead, the applicant was suing to recover a suit land with the **estimated** value of Tshs. 150million. Therefore, I am of the considered view that the 9th schedule of ***GN No. 264*** (*supra*) is inapplicable to this case. In lieu thereof, the appropriate schedule is the 11th. Under the latter, costs for other proceedings in courts and tribunals are provided for. Pursuant to item 1 (d) of the 11th schedule, fee for

defending proceedings in court or tribunal is permissible on reasonable basis provided it is not less than Tshs. 1,000,000.

As correctly submitted by the counsel for the applicant, the matter ended at the stage of preliminary objection. Discerning from the record, it is evident that the advocate for the respondent started appearing at DLHT from 15/11/2021 for mention to 10/6/2022 for ruling. That arithmetic yields a total of about 7 months. It was argued by the counsel for the respondent that the matter started from the stage of suing a wrong party, involving police, discovery of the proper party up to the ruling. However, such arguments would, with respect, otherwise assist the applicant not the respondent. The latter was not involved in such processes.

Therefore, considering the circumstances involved in this matter, I am inclined to reduce the instruction fee to Tshs. 1,500,000. Without repeating myself, unnecessarily, the proceedings from which taxation emanated was neither based on liquidated sum nor was the case complex. Further, appearance by the respondent and/or his counsel is cumulative for seven months only; and in the interest of public policy, people should be allowed to access justice inexpensively; court justice should not be

reserved only for the well-to-do people; and parties not to be penalized by the inactions or omissions of their respective advocates.

I now turn to attendance costs. DLHT awarded the respondent Tshs. 400,000 per each appearance. Actually, as he had prayed. The applicant's counsel contended that the same was excessive considering the fact that all appearances were for mention save for the date of ruling. The respondent, on the other hand, submitted that the figure was reasonable because advocates waited for an average of two hours each appearance. With applicable respect, the counsel seems to misconceive this aspect.

I am heedful of the fact that, in assessing the duration of court appearance, "the determinant factor is time spent and not the purpose of attending court" [***Muhoni Kitege v The Principal Secretary Ministry of Energy and Minerals & Another***, Misc. Land Application 123 of 2021(unreported)]. Nevertheless, in law, appearance means appearance before the adjudicator when respective proceedings are recorded not the time spent in court corridors or registries.

However, the taxing master did not arrive at such figure on time-spent basis. He taxed it on mere appearance before DLHT (see page 7 of the ruling). In ***Phares Wambura and 15 Others v Tanzania Electric***

Supply Company Limited, Civil Application No. 186 of 2016, (unreported) the Court of Appeal held at page 10, *inter alia*, that being in court premises does not amount to appearance but actual presence before the responsible judicial officer does. The holding has religiously been followed by this court in various cases including, ***TT Investment Limited v Mar Kim Chemicals Limited***, Misc. Land Appeal No. 116 of 2020; ***Said Seleman Mamoja v Commissioner for Lands and 2 others***, Misc. Land Application No. 79 of 2023; and ***Karato Massay v Qwaray Massay and another***, Land Appeal No. 09 of 2020 (all unreported).

Consequently, guided by the 8th schedule [item 3 (a)] to the ***Order***, the amount under this folio is taxed at Tshs. 50,000 per each date of appearance. I observe and hold that the estimated time of 15 minutes is reasonable for each round. However, in respect of date of ruling, I grant Tshs. 100,000 to reflect about 30 minutes of receiving the ruling.

Further, perusal of the trial court record evidences that, the respondent prayed for 8 days of appearance. But, for Application No. 109/2021 no appearance was registered on 29/10/2021, 25/11/2021, 18/2/2021 and 22/4/2021. Appearance was documented for 15/11/2021, 13/12/2021, 17/1/2022 (not included in the bill), 19/01/2022, 21/1/2022,

24/3/2022; and 10/6/2022 for ruling. Thus, 6 days tally: 5 days for mention and 1 for ruling.

Having reduced the amount of the date of ruling from Tshs. 400,000/= to Tshs. 100,000; and Tshs. 400,000 to the Tshs. 50,000 for the rest of appearances; the total amount hereof lessens from the DLHT-taxed Tshs. 4,100,000 to Tshs. 350,000. In addition, the figure for 2 days at Tshs. 50,000 each spent for attendance to file written statement of defence and written submissions is allowed. That is, Tshs. 100,000 in total. The basis is that it is both reasonable and uncontested by the applicant.

Regarding consultation fee of Tshs. 100,000 at 02/12/2020, both sides agree that the dispute between parties had not arisen. However, the respondent submitted that the same was a mere slip of pen as the correct date was 2/12/2021. Again, the taxing master said nothing for such fee. He only taxed folios 14-21 in their totality. This was an apparent error of the part of DLHT. The subject items included costs for drawing documents, photocopying expenses and consultation fee; to mention but a few.

Assuming that the correct date was 2/12/2021 as submitted by the respondent, the record reveals that the advocate started representing the respondent from 15/11/2021. It beats logic that representation in this

matter started before consultation. For that reason, I tax it off. That is, Tshs. 100,000 billed as consultation fee is disallowed. I will not, however, interfere with items 14, 15, 16, 17, 18, 19 and 20. These were not contested by the applicant too. They make a total of Tshs. 132,000.

In fine, for the reasons stated above, the application succeeds. The total taxed amount of Tshs. 7, 872,000 by the DLHT stands reduced and adjusted to Tshs. 2,082,000. Each party to shoulder own costs for this application. I so order.

C.K.K. Morris
Judge
June 2nd, 2023

Ruling is delivered this **2nd** day of **June 2023** in the presence of Ms. Judith Nyaki and Dr. George Mwaisondola, learned advocates for the applicant and respondent respectively.

C.K.K. Morris
Judge
June 2nd, 2023